No. 87-2000

In The

SUPREME COURT OF THE UNITED STATES
October Term 1987

LAST CHANCE MINING CO. INC.,
Petitioner,

-against-

THE UNITED STATES,
Respondent,

ALASKA PACIFIC, INC.
Petitioner,

-against-

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GREGORY J. CHACHAS
174 Dorchester Drive
Salt Lake City, Utah
84103
Counsel of Record
(801) 521-0880

QUESTIONS PRESENTED FOR REVIEW

Petitioner corporations were owners of certain unpatented mining claims on the public domain in Nevada. The Federal Land Policy and Management Act of 1976 required certain recordations, which if not accomplished would extinguish the claims. The petitioners assert that because of errors in the Bureau of Land Management office charged with the recording functions, petitioners's documents were not properly recorded and as a consequence the claims reverted to the United States and were re-located by others. The Claims Court granted the defendant's motion for judgment on the

pleadings and the Court of Appeals for the Federal Circuit affirmed.

The questions presented are:

1. Whether the loss of valuable mining claims because of erroneous actions of the Bureau of Land Management is compensable under the U.S. Constitution.

2. Whether the Claim Court was correct in ruling that the petitioners had failed to exhaust their administrative remedies when, in fact, there had been no adverse administrative decision against them and further administrative actions would avail them nothing.

STATEMENT PURSUANT TO RULE 28.1

The controlling stock in petitioner corporations is owned by Gregory J. Chachas, counsel of record in this petition. There are no parent, subsidiary or affiliate corporations otherwise.

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Petitioners, Last Chance Mining Co., Inc., and Alaska Pacific, Inc., petition for a writ of certiorari to review the judgments of the United States Court of

Appeals for the Federal Circuit entered in these related actions on March 17, 1988.

OPINIONS BELOW

The opinion of the United States Claims Court was reported at 12 Ct. Cl. 551 (1987) and appears in Appendix A hereto. The opinion of the Court of Appeals for the Federal Circuit simply adopts the reasoning of the Claims Court and is unpublished. It appears in Appendix B hereto.

BASIS OF JURISDICTION

The opinion of the Court of Appeals for the Federal Circuit was rendered March 17, 1988. No petition for rehearing was filed.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1982) ("FLPMA") and the takings and due process provisions of the Fifth Amendment to the United States Constitution. The text of the relevant portions appear in Appendix C hereto. The case also involves 43 CFR § 4.410 which is also contained in Appendix C hereto.

STATEMENT OF THE CASE

This case involves the interaction of federal legislation designed to assist in the management of the public domain, the failure of the Bureau of Land Management to properly record certain documents and the alleged loss of valuable mining claims as a result thereof.

The petitioners, between them, owned 100% of certain unpatented mining claims in Nevada. Prior to the passage of the Federal Land Policy and Management Act of 1976, ("FLPMA"), there was no requirement or procedure for recording these claims with the federal government. FLPMA changed this by requiring the recordation of certain documents concerning claims located prior to the effective date of the Act, as well as documents concerning claims located subsequent to the act--a situation not here in controversy. The stated statutory consequence of noncompliance was the "conclusive abandonment" of the claim(s).

It is the petitioners' position that the requisite documents were timely mailed to the proper office of the Bureau of Land Management but that office, in some

manner unknown to petitioners, failed properly to record these documents. The result was that, under the wording of FLMPA, the claims were conclusively deemed to have been abandoned by the petitioners. Shortly after the deadline for recording pre-1976 claims (actually only about two weeks, Nov. 15, 1979), others located mining claims over the area involved and have proceeded to develop a mine and to remove valuable ore therefrom.

In 1985, this court held in Locke v. United States, 105 S. Ct. 1785, that FLMPA meant exactly what it said and that failure to have properly recorded mining claims results in their extinguishment.

Between the date that others located claims on the area for themselves, and the Locke decision, it became apparent that

the BLM office had received the documents from the petitioners and BLM then attempted, ineffectively however, to rectify the error and to accept, belatedly, copies of the documents originally tendered but not recorded. By this time, however, the injury had occurred because the new claimant had located mining claims and was, in fact, mining. Subsequently, and after the injury had occurred and had become a chose in action which does not run with the land, the petitioners' predecessor quitclaimed his interest in the area to the new claimants. Since the cause of action for loss of the valuable claims had already occurred, this action simply transferred nothing to the new claimant and did not extinguish any cause of action for injury already incurred.

Thus it is the petitioners' position that although the proper documents were timely mailed to the proper BLM office that the failure of that office to timely and properly record them--particularly when coupled with the conclusive effect of FLPMA under the Locke decision--was that the claims reverted to the United States, thus permitting others to make mining locations on them, permanently depriving petitioners of their claims and any right to them.

ARGUMENT

A.

THE CUMULATIVE EFFECT OF FLPMA, BLM'S FAILURE PROPERLY TO RECORD THE TENDERED DOCUMENTS, AND THE LOCKE DECISION EFFECTED A COMPENSABLE TAKING UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

It is the petitioners' position that the cumulative effect of FLPMA (which required certain recordings or suffer the loss of mining claims), BLM's failure properly to record the documents tendered by petitioners' predecessor in interest, and this Court's holding in Locke v. United States (which was that failure properly to record mining claims did, in reality, effect an abandonment of them) effected a constitutionally impermissible taking of the petitioners' mining claims.

This taking was accomplished by effecting an abandonment of the claims which then rendered the area immediately open to subsequent locators long prior to the petitioners' predecessor in interest's learning that BLM had failed properly to record the tendered documents.

One of the main themes of the Claim Court was that the actions or inactions involved in the instant case could not effect a taking under the Fifth Amendment to the United States Constitution. It is not necessary that the government have "acquired" the property in order to have "taken" it in violation of the Constitution. Thus in United States v. General Motors Corp., 323 U.S. 373 (1945), this court observed that a taking could be accomplished by any action that deprived an owner of his property. This might be destroying or damaging it. That case involved the right of compensation to a tenant of a long term lease when the United States temporarily took over the building.

The effect of the error of the Bureau of Land Management was to cause the land to revert to the United States and, in the status then of public domain land, to permit it to be almost immediately relocated by others. It requires no great leaps of logic to recognize that this did accomplish a "taking" by the United States because the interest of the petitioners was extinguished and the result thereof was that the United States now held the land unencumbered by petitioners' mining claims until relocated by others.

Even at that, if one is reluctant to find a "taking" in the sense of acquisition by the United States of petitioners' interests, such a complete "taking" is not always essential to a finding of a taking under the Constitution. This was pointed out in

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). As indicated in that case, the deprivation of an owner of his property may constitute a "taking" even though a sovereign does not acquire the interest.

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) is a direct precedent in a similar factual setting in which this Court found that inaction did effect an unconsitutional taking. In Logan, a purportedly wrongfully discharged employee timely filed a charge claiming wrongful discharge but, apparently through inadvertence the Illinois Fair Employment Practice Commission convened a factfinding conference five days after the stated statutory period for such a conference and the Suprme Court of Illinois held that the employee had lost his rights because the factfinding conference was

jurisdictional. This Court, in a unanimous decision, held that the Illinois decision should be reversed and remanded because the employee had been "deprived of a protected property interest in violation of the Due Process Clause of the Fourteenth Amendment." (from the Court's syllabus)

The rationale of the Logan decision should be applied in this instance because otherwise the "conclusive abandonment" provisions of FLPMA will effect a taking in violation the Fifth Amendment to the United States Constitution. The "conclusive abandonment" provisions of FLPMA are new and unique in the federal setting.

Furthermore, the fact that the United States made no physical intrusion on the

property involved should be relatively immaterial. As this Court indicated in Kirby Forest Indus., Inc. v. United States, 467 U.S. 1 (1984), the government need not physically intrude on the property or acquire a legal interest in it in order for there to have been a compensable taking. That case involved a radical curtailment of an owner's freedom to use his land. In that vein, it would seem that totally depriving one of his land by inaction, when action was statutorily required by a public official, thereby permitting a third party to acquire another's valuable property rights should prompt the same result.

B.

PETITIONERS WERE DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW AND THE LOWER COURTS' RELIANCE ON AN

"EXHAUSTION OF ADMINISTRATIVE REMEDIES" THEORY IS FACTUALLY MISPLACED.

Petitioners believe this case to be truly unique--it is certainly not a run-of-the-mill matter. It is and has been petitioners' contention that its mining claims were lost to it because of a failure in 1979 by BLM officials properly to record tendered documents and the conclusive effect of the Locke decision, and that, by the time, the BLM officials recognized that the documents had been tendered (and apparently lost by them) and they accepted substitute documents, the damage had been done. The claims in question had been relocated by others.

The tardy acquiescence by BLM in the petitioners' contention that the documents

had been timely tendered--but after the loss had occurred--really left to adverse administrative ruling from which the petitioners could have appealed.

Title 43, Code of Federal Regulations, section 4.410 specifies that only a party who receives an adverse administrative determination may appeal to the Department of the Interior Board of Land Appeals. This is all well and good--as the expression goes--but this provision would have availed petitioners nothing because (1) there had been no adverse ruling against them--their documents had ultimately been accepted, although too late to have precluded the loss which had already occurred, and (2) at this juncture pursuing any administrative remedies within the Department of the Interior would have been useless, futile,

and of no effect, and (3) it is the loss of the claims which is the gravamen of petitioners' complaint before the Claims Court.

Although the doctrine of exhaustion of administrative remedies is a salutary concept, it is quite inapplicable here and the Claims Court erred in relying on it in part in its decision. There was no adverse decision because the claims were never denied and, indeed, were ultimately accepted. The issue is whether petitioners' can be compensated when the Bureau of Land Management did not properly record their documents and as a consequence the petitioners suffered the loss of their claims.

No administrative action within the power of the Bureau of Land Management

could restore to petitioners the claims which had been lost. Although it concerns a different subject matter, see, for example, Lyons v. U.S. Marshalls, 840 F.2d 202 (3rd Cir. 1988) where the court says that the doctrine is inapplicable where the remedy available would be inadequate. Since the Bureau of Land Management had no power to restore petitioners' claims to them, the remedy through that channel would clearly be inadequate, since "no remedy" is an inadequate remedy. To a similar effect, see, Levers v. Anderson, 326 U.S. 219 (1945). Language to the same effect is found in AlliedGeneral Nuclear Services v. United States, 839 F.2d 1572 (Fed. Cir. 1988). And in Ramon-Sepulveda v. INS, 824 F.2d 749 (9th Cir. 1987) the court voiced the exception to the exhaustion of administrative remedies rule in the situation where such

an effort would be futile. For a fuller discussion, see 4 K. Davis, Administrative Law Treatise, 464-8 (2d ed. 1983).

In the instant matter the Bureau of Land Management was legally incapable of restoring petitioners' claims, and thus it is obvious that further administrative efforts would have been futile. No matter how expressed, it is clear that the reliance by the Claims Court on the doctrine of exhaustion of administrative remedies served only to deprive petitioners of their property without due process of law.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review

the judgment of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

GREGORY J. CHACHAS
Counsel for the Petitioners
174 Dorchester Drive
Salt Lake City, Utah
84103
(801) 521-0880

APPENDIX A

IN THE UNITED STATES CLAIMS COURT

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LAST CHANCE MINING CO., Plaintiff,

v.

The UNITED STATES, Defendant.

No. 403-85L.

United States Claims Court.

June 26, 1987.

--0--

Clement Theodore Cooper, Washington, D.C., for plaintiff; Gregory J. Chacas, Ely, Nev., of counsel.

Gerald S. Fish, Washington, D.C., for defendant.

OPINION

BRUGGINK, Judge.

This action is currently before the court on plaintiff's motion for summary judgment and defendant's motion for

judgment on the pleadings. After consideration of the parties' written submissions[1] and oral argument, for reasons set forth herein, the court concludes that plaintiff has failed to state a claim upon which relief can be granted.

BACKGROUND[2]

Prior to December 1979, Last Chance Mining Company ("Last Chance") owned a fifty percent interest in unpatented lode

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[1] The parties were given the opportunity to make certain additional submissions after oral argument. Defendant's submission of June 15, 1987 was responsive to the court's order of June 3, 1987, and thus plaintiff's Motion to Strike Defendant's Response is denied.

[2] For purposes of resolving both these motions, the facts recited in plaintiff's complaint, as amended, will be taken as correct.

mining claims known as Pioneer # 1 through # 22. Alaska Pacific, Inc. owned the remaining interest. The claims are situated in the Bald Mountain area of White Pine County, Nevada. The claims were originally located in 1940 pursuant to the Mineral Location Act of 1872, 30 U.S.C. §§ 22 et seq. (1982).[3]

In 1976, Congress enacted the Federal Land Policy and Management Act, 43 U.S.C.

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[3] The Mineral Location Act allows United States citizens to go onto unappropriated public land to prospect for and develop certain minerals. "Discovery" of a mineral deposit, followed by procedures to formally "locate" the deposit, gives an individual the right of exclusive possession of the land for mining purposes. 30 U.S.C. § 26. After certain statutory conditions are fulfilled, an individual may patent the claim and purchase from the government the land and minerals and obtain title to them. Patenting is not required, however, and an unpatented mining claim remains a recognized possessory interest. United States. v. Locke, 471 U.S. 84, 86, 105 S.Ct. 1785, 1788, 85 L.Ed.2d 64 (1985).

§§ 1701-1782 (1982) ("FLPMA"). Section 314 of the act creates a federal recording system designed to clear up uncertainty surrounding many mining claims. 43 U.S.C. § 1744.

Under the recording system, a notice or certificate of location of the claim must first be filed with and recorded by the Bureau of Lands Management ("BLM") within three years of the statute's enactment, that is on or before October 22, 1979. Also, in the year of the initial recording, and prior to December 31 of every year thereafter, the claimant must file with state officials and with BLM either a notice of intention to hold the claim, an affidavit of assessment of work performed on the claim, or a detailed reporting form. 43 U.S.C. § 1744(a).

Section 314(c) states that failure to comply with the requirement "shall be

deemed conclusively to constitute an abandonment of the mining claim ... by the owner." 43 U.S.C. § 1744(c). The constitutionality of this section and its implementing regulations was upheld in United States v. Locke, 471 U.S. 84, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985).

Last Chance alleges that on October 17, 1979, it complied with the statutory requirement by sending the following documents by certified mail to BLM: (a) a statement of ownership; (b) a plot or map delineating the claims; and (c) a supplemental claim map of the Pioneer claims, Copper Basic Area in Bald Mountain. The map bore a stamp evidencing filing with the White Pine County, Nevada Recorder's Office on September 23, 1976. Defendant contends that it did not receive

these materials prior to October 22, 1979.

To support its claim that it sent these materials to BLM on October 17, 1979 and that BLM received the notice of claim prior to October 22, 1986, plaintiff submitted a receipt showing a certified mailing to BLM with a postmark of October 17, 1979. Plaintiff does not have a return receipt, however. Additionally, the court allowed to be filed during oral argument the affidavit of Romolo DiCianno, Postmaster of the U.S. Post Office at Reno, Nevada, in which he testifies that plaintiff had mailed a package to BLM by certified mail and that the package was hand delivered to BLM by the post office prior to October 22, 1979. Moreover, as further circumstantial support of timely filing, plaintiff points to a note to him

from BLM dated November 15, 1979, indicating that it was returning the 1978 Proof of Labor forms submitted to the office since those forms were not needed "at this time."

Last Chance alleges that on November 15, 1979, a company identified as Placer-Amex, Inc. ("Placer") "top filed" plaintiff's claims and "jumped" the area, presumably ousting Last Chance of any interest. Soon after, Placer began mining the claims, and eventually constructed a plant costing approximately $12 million and employing 20 workers. It has subsequently extracted large amounts of ore.

On December 13, 1983, defendant sent the following letter to plaintiff:

This is in reference to your unpatented mining claim(s) listed below.

Pioneer, Pioneer # 1-22
N MC 291839-291861

Section 314 of the Federal Land Policy and Management Act of 1976 requires that an owner of an unpatented mining claim must record their claims with the Bureau of Land Management. To meet this requirement, you must submit the following items to this office.

A one-time service fee of $5.00 per claim which is not returnable.

A copy of the Notice or Certificate of Location per claim, which has been filed or will be filed with the County.

Since your service fees are short by $115.00 it will be necessary for you to forward that amount to us within 30 days upon receipt of this notice along with the copies of your certificates of location. Failure to submit the proper fee and certificates shall cause the recordation to be rejected and returned to the owner.

Also, since these claims were located in 1940, in order to have

> properly recorded claims, you will need to send us copies of your 1979, 1982, and 1983 proofs of labor. Please submit these documents along with your service fees and certificates.

Plaintiff argues that this letter constitutes a recognition of the timely filing prior to October 22, 1979. Defendant contends that it reflects materials received after that date.

Although it does not appear in the pleadings or submissions, counsel for Last Chance represented in court during oral argument that plaintiff's President had several contacts in person or by telephone with BLM officials before and after the December 13 letter. Plaintiff undertook no formal appeal or challenge of the apparently unfavorable result of those contacts. Other than the submissions and pleadings in this action, the only official statement by BLM rejecting Last

Chance's assertion appears in affidavits filed by defendant in litigation brought in state court by the former co-owner, Alaska-Pacific. In any event, on May 8, 1985, Last Chance and others quitclaimed to Placer whatever rights they had in the unpatented mining claims at issue.

A complaint was filed in this court on July 8, 1985, seeking $50,000,000.00. Last Chance alleges that by not properly recording documents timely submitted in compliance with FLPMA, defendant extinguished its claims and is thus liable for their value. Last Chance's motion for summary judgment is predicated on three independent legal theories: first, the Secretary of Interior held Last Chance's possessory interest in constructive trust and by failing to properly record plaintiff's claims the Secretary and his

agents violated their fiduciary obligations under the trust; second, that FLPMA and its implementing regulations created an implied-in-fact contract which was breached by defendant's failure to properly file Last Chance's claim; third, the failure to record plaintiff's claim constituted a taking in violation of the fifth amendment to the Constitution.

In opposition to plaintiff's motion for summary judgment, defendant has filed the declaration of Pamela Reynolds, former Supervisory Conveyance Examiner, Mining Claim Recordation Section, BLM, for the purpose of challenging Last Chance's assertion that BLM received the necessary filing in a timely fashion. Moreover, in its own motion for judgment on the pleadings defendant contends that even assuming Last Chance possessed a mining

claim and timely submitted materials which BLM failed to properly record, plaintiff has not stated a cause of action. Because the court agrees with the latter analysis, it is not necessary to determine if a conflict of material fact exists as to whether plaintiff's materials were properly submitted and received.

DISCUSSION

The Breach of Trust Claim

Last Chance argues that a trust exists in which the Secretary of Interior acts as trustee of public lands for the benefit of all unpatented mining claimants. This trust allegedly imposes specific duties and obligations upon the Secretary which were violated by BLM's failure to record the certificate of location, failure to

timely notify plaintiff that location certificates had been presented for filing by Placer, and by collusion between BLM and officials of Placer. As a result of the asserted violation of defendant's fiduciary duty, Last Chance argues that its claims were extinguished.

To invoke the jurisdiction of this court under 28 U.S.C. § 1491 a claimant must demonstrate a substantive right to money damages from the United States based on "the Constitution, or an Act of Congress, or any regulation of an executive department." See United States v. King, 395 U.S. 1, 2-3, 89 S.Ct. 1501, 1502, 23 L.Ed.2d 52 (1969). To accomplish this, "the claimant must demonstrate that the source of substantive law relied upon 'can fairly be interpreted as mandating compensation by the Federal

Government for the damages sustained,' " United States v. Testan, 424 U.S. 392, 400, 96 S.Ct. 948, 954, 47 L.Ed.2d 114 (1976) (quoting Eastport S.S. Corp. v. United States, 178 Ct.Cl. 599, 607, 372 F.2d 1002, 1009 (1967)). The jurisdiction afforded by section 1491 is limited to "actual, presently due money damages from the United States;" it does not, in general, include equitable relief. Testan, 424 U.S. at 397-98, 96 S.Ct. at 953. The initial difficulty thus faced by Last Chance is that a suit based on a trust obligation sounds in equity. Blankenship v. Boyle, 329 F.Supp. 1089, 1112 (D.D.C.1971); Scott, The Law of Trusts § 2.7 (3d ed. 1967).

In any event, Last Chance is unable to point to any act or regulation which can be construed as creating a trust

relationship between it and the United States, much less one which is justiciable in this court. Last Chance correctly points out that the Secretary of the Interior, as a representative of the Government, holds all public lands in trust, and that he is obliged to see that no public land is wasted or disposed of to a party not entitled to it. Knight v. U.S. Land Assoc., 142 U.S. 161, 181, 12 S.Ct. 258, 263, 25 L.Ed. 974 (1891). However, he holds that position of trust, not for the benefit of any given individual, but "for all the people." United States v. California, 332 U.S. 19, 40, 67 S.Ct. 1658, 1669, 91 L.Ed. 1889 (1947). Last Chance is unable to cite any decision suggesting that mineral claimants are the specific beneficiaries of a

general trust relationship with the Government.[4]

The statute and supporting regulations which Last Chance relies on, specifically the Mineral Location Act of 1872 and the FLPMA, cannot reasonably be construed to

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[4] Last Chance's reliance on cases concerning claims brought by Indian tribes is totally misplaced. This court is specifically given jurisdiction over such claims by 28 U.S.C. § 1505, which states in part:

> The United States Claims Court shall have jurisdiction of any claim against the United States ... in favor of any tribe ... whenever such claim is one arising under the Constitution, laws or treaties of the United States....

The existence of a special trust relationship between the United States and Indian people is well established by statute and case law recognizing a right to sue for damages for breach of trust in this court. See, e.g., United States v. Mitchell, 463 U.S. 206, 225, 103 S.Ct. 2961, 2972, 77 L.Ed.2d 580 (1983); 25 U.S.C. § 348 (1982).

create a trust relationship between mining claimants and the United States Government. Plaintiff's attempt to state a claim on this basis thus fails.

The Contract Claim

The statute and regulations in issue clearly do not grant a right to monetary relief against the United States. Nevertheless, Last Chance argues that the "plethora of rules, regulations and statutes involving federal mining law" form an implied contract between the Government and it. Plaintiff points first to 30 U.S.C. § 22. That section, however, merely declares that mineral deposits on federal lands are open to exploration and purchase. Last Chance argues that this provision constitutes an offer which was accepted when it entered onto the land,

although it does not specify what the terms of the Government's offer were. Last Chance sees its acceptance and the consideration flowing from it as the actions involved in entry, discovery and location, and in the payment of fees. Additional terms of the contract are found in FLPMA and its implementing regulations, which as discussed above, place upon claimants certain filing requirements. Implicit in these obligations upon claimants, Last Chance sees a duty on the part of BLM to file properly submitted materials.

Before declaring these ingredients a contract, plaintiff adds three board of contract appeals decisions, Sogge Construction Co., IBCA No. 286, 62 BCA p 3594 (1962); Kenneth Holt, IBCA No. 279, 61-1 BCA p 3060 (1961); and Knox Constr.

Co., No. 38, slip op. (IBCA Dec. 12, 1955). Last Chance cites these cases for the proposition that a contractor is entitled to damages for delay. These decisions are of no utility for plaintiff's purposes, however. They are predicated upon an indisputable contractual relationship based on a written agreement between a plaintiff and the Government. They thus relate to delay only in that context. They do not stand for the proposition that an alleged failure to record a document constitutes a breach of contract in the absence of an underlying agreement.

Nothing in Last Chance's analysis fulfills the requirements necessary to show a contractual relationship between the parties. An implied-in-fact contract requires a showing of the same contractual

elements as an express contract. Mutuality of intent and lack of ambiguity in offer and acceptance must be established. Fincke v. United States, 230 Ct.Cl. 233, 244, 675 F.2d 289, 295 (1982); Algonac Mfg. Co. v. United States, 192 Ct.Cl. 649, 674, 428 F.2d 1241, 1255 (1970). The statutes and regulations here in question do not purport, even by implication, to constitute an offer. While in the broadest sense, the FLPMA is an "offer" to allow proof of claims, it is certainly not an offer to contract. It is more accurately characterized as a unilateral ultimatum on the part of the Government. It would do violence to traditional contract theory, not to mention the operation of government, to hold that any statute requiring some action by a citizen to obtain a benefit or protect a right constituted an open offer

to contract.[5] The court concludes that Last Chance does not state facts upon which a contract can be predicated.

The Taking Claim

It is difficult to be precise in describing the sine qua non of a governmental taking. The Court has referred to these determinations as "essentially ad hoc." Kaiser Aetna v. United States, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1969). Although physical invasion and physical restraint are not necessary, Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 887 (Fed.Cir.1983), the Supreme

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[5] The circumstances here are not like those addressed in Nutt v. United States, 12 Cl.Ct. 345 (1987), where there was an allegation that regulatory obligations were incorporated by reference in a written contract.

Court has said that a "taking" may be more readily found when the interference with property can be characterized as a physical invasion by the government. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). Numerous commentators have reflected the diversity of opinion and the apparent lack of cohesiveness in this body of law. Van Alstyne, Taking or Damaging by Police Power: the Search for Diverse Condemnation Criteria, 44 S.Cal.L.Rev. 1 (1971); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L.Rev. 1165 (1967); Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964).

Plaintiff cites no precedent, however, for the proposition that the inaction of a

regulatory body in carrying out its statutory duty under circumstances similar to those alleged here has ever been held to be a taking. After considering the authorities cited by plaintiff and numerous others, the court concludes that the fifth amendment prohibition on taking private property "for public use without just compensation" is not implicated here. The one common denominator in cases finding a taking is that there was a public purpose animating some affirmative action or statement, whether that purpose finds expression, for example, in a regulation for health and safety, a physical entry, a confiscation, or a land use restriction.[6] This requirement is no

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[6] See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, --- U.S. ----, 107 S.Ct. 2378, 95 L.Ed.2d 250 (1987) (ordinance prohibiting construction or reconstruction of building in an interim

more than a reflection of the fifth amendment itself, which is predicated on a taking "for public use."

Plainly here there has been no "actual invasion or taking," no direct appropriation or destruction, no "direct interference with or disturbance of property rights." R.J. Widen Co. v. United States, 174 Ct.Cl. 1020, 1027-28, 357 F.2d

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flood protection area may constitute temporary taking); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (statute required public disclosure of all health, safety and environmental data even if disclosure involved trade secrets); Loretto v. Teleprompter Manhattan CATV and Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (statute provided that landlord had to permit cable television company to install facilities upon his property); United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) (flights of aircraft over private lands were physical invasion); and Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928) (zoning ordinance).

988 (1966). Assuming Last Chance is correct, the extremely unfortunate result is more closely akin to the incidental or indirect consequences of governmental actions which the court in R.J. Widen Co. characterized as not constituting takings.

Moreover, while regulatory action clearly can constitute a taking, First English Evangelical Lutheran Church v. County of Los Angeles, --- U.S. ----, 107 S.Ct. 2378, 95 L.Ed.2d 250 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-28, 98 S.Ct. 2646, 2659-61, 57 L.Ed.2d 631 (1978); Deltona Corp. v. United States, 228 Ct.Cl. 476, 486, 657 F.2d 1184, 1190 (1981), cert. denied, 455 U.S. 1017, 102 S.Ct. 1712, 72 L.Ed.2d 135 (1982), Last Chance specifically disavows any complaint as to the operation of the

statute or its implementing regulations. Rather, it is the inadvertence or neglect of one or more BLM employees of which Last Chance complains. Its legal theory is simply a mismatch in light of the allegations. At best, assuming the allegation to be true, defendant's employees negligently failed to process plaintiff's claim. Clearly there is no "public use" resulting from negligence or malfeasance in the conduct of the regulatory scheme. While the public benefits from the overall effect of the forfeiture statute, the statute is not the basis of plaintiff's claim.[7]

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[7] This is not to suggest that a negligent act can never constitute a taking. A direct invasion of property might result from negligent operation of a bulldozer, for example. Here, however, the alleged results of inaction were neither intended nor a direct appropriation, confiscation, or invasion.

The facts here are similar to those considered by the Court of Claims in Eastport Steamship Corp. v. United States, 178 Ct.Cl. 599, 372 F.2d 1002 (1967). In that case, the plaintiff purchased a former German merchant vessel made available for sale by the Government as part of German war reparations. Plaintiff was unsatisfied with the ship and wanted to make a sale to a foreign purchaser, which required approval by the Maritime Commission. The Commission neglected to act in a timely fashion on plaintiff's request and the sale was lost. One of plaintiff's theories of liability was that the Government deliberately withheld approval and that this constituted a taking. The court rejected this argument, writing that

> there was no taking requiring compensation under the Fifth Amendment. Neither the plaintiff's ship nor its contract with the Danish buyer was appropriated. Omnia Commercial Co. v. United States, 261 U.S. 501 (43 S.Ct. 437, 67 L.Ed. 773) (1923). The Commission's role was simply part of a pre-existing regulatory process known to plaintiff from the time it purchased the Eastport, and the Commission's failure to give its approval within the necessary time took no property from plaintiff any more than a comparable failure by the Federal Trade Commission, the Securities and Exchange Commission, or the Federal Power Commission, in their administrative processes, would amount to a taking.

178 Ct.Cl. at 612, 372 F.2d at 1011. The court concludes that the facts pleaded by plaintiff do not dictate a result different from that in Eastport. The government action or inaction here did not constitute a compensable taking within the meaning of the fifth amendment.

Other Considerations

The court has reviewed and rejected the three asserted bases for relief and found that even under the facts alleged, Last Chance cannot prevail. While during oral argument plaintiff's counsel declined any suggestion that the case might be transferable to district court, the court adds the following observations. Initially, the court notes that if Last Chance were appealing a final administrative decision by the Department of Interior rejecting its mineral rights claims, this court would not have the authority to "look behind, ... reexamine ... (or) ignore it." Aulston v. United States, 11 Cl.Ct. 58, 60 (1986); see also Freese v. United States, 221 Ct.Cl. 963 (1979); Patterson v. United States, 115 Ct.Cl. 348 (1950); Dawson v. United

States, 113 Ct.Cl. 82, 81 F.Supp. 1021 (1949). This court does not have authority to grant money damages based on an unwarranted or unjustified decision holding a mining claim invalid. Dawson v. United States, 113 Ct.Cl., 82, 84, 81 F.Supp. 1021, 1002 (1949). As the court in Freese stated:

> This court does not lack general jurisdiction to determine whether a mining claim was taken by the Government without the payment of just compensation. Thus, we have general jurisdiction over all the essential elements of plaintiff's claim. We do not, however, have the particular power to overturn the Interior Department's conclusion that 26 of the mining lode claims allegedly owned by plaintiff and all of the millsite claims do not qualify as "claims" under 30 U.S.C. § 22 et seq. (1976), nor can we ignore such an administrative conclusion. Congress has chosen to place authority to review these decisions of the Secretary of the Interior in the United States District Courts.

221 Ct.Cl. at 964-65.

More recently in Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed.Cir.1986), the plaintiff challenged the denial of a permit to mine limestone by plaintiff. The rationale behind denying the permit by the Army district engineer was that the proposed method of limestone mining was a potential source of pollution. At the trial level, the trial judge reviewed the evidence and found that the proposed mining would not pollute and that the district engineer's decision to deny the permit was wrongful and constituted a taking. On appeal the Federal Circuit held that the trial court erred in looking behind the district engineer's finding of potential pollution from Florida Rock's project. The court stated: "the proper way to challenge the

decision to grant or withhold the permit would be under the Administrative Procedure Act ...," and that thus the district court and not the Claims Court had jurisdiction to decide the validity of permit denial. Id. at 899.

Defendant also points to an unreported decision of the United States District Court for Utah in Hirsch v. Clark, No. NC 83-0097A (August 29, 1984), involving similar allegations of failure to record, as confirmation that Last Chance's proper recourse, if any, would have been to obtain an administrative decision (see 43 C.F.R. §§ 4.400 through 4.452-9) and seek review under the Administrative Procedure Act in district court. See 5 U.S.C. §§ 701-706 (1987). Complicating plaintiff's circumstances here, however, is the fact that it has not exhausted its

administrative remedies.[8] There is no "decision" ripe for review. See Aulston, 11 Cl.Ct. at 59.

Consequently, even assuming Last Chance possessed evidence of timely filing, it faces an additional obstacle in this court. Assuming there were a final administrative decision rejecting Last Chance's claim, we are not empowered to review that determination. Furthermore, in view of Last Chance's declination of a

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[8] Defendant points to the department's decision in Calazona Fertilizer Company, 66 I.D. 4, 9 (1959). There, it was held that a party "can call to the Department's attention any irregularities in its proceedings at any time," and that the Department "can always consider the question of lack of authority to act," or of irregularity in its actions, "no matter how the matter is brought to its attention." Once a protest has been made, an appeal thereafter will "lie from any adverse BLM decision." Julie Adams, et al., 45 IBLA 252, 254 (1980).

transfer under 28 U.S.C. § 1631, and the lack in any event of a final administrative decision, transfer would be inappropriate.

CONCLUSION

For the reasons stated herein, plaintiff's motion for summary judgment is denied. Defendant's motion for judgment on the pleadings is granted. The clerk is directed to dismiss the complaint. No costs.

APPENDIX B

B1

LAST CHANCE MINING COMPANY, INC.,

Plaintiff-Appellant,

v.

The UNITED STATES,

Defendant-Appellee.

ALASKA PACIFIC, INC.,

Plaintiff-Appellant,

v.

The UNITED STATES,

Defendant-Appellee.

Nos. 87-1600, 88-1092.

United States Court of Appeals, Federal Circuit.

March 17, 1988.

12 Cl.Ct. 551

AFFIRMED.

Before RICH, NIES and MAYER, Circuit Judges.

PER CURIAM.

B2

Last Chance Mining Co. and Alaska Pacific, Inc. appeal from respective judgments of the Claims Court dismissing their complaints seeking compensation from the United States for the alleged loss of mining claims. Last Chance Mining Co. v. United States, 12 Cl.Ct. 551 (1987); Alaska Pacific, Inc. v. United States, No. 396-87L (Cl.Ct. Oct. 16, 1987). The Claims Court held that the complaints failed to state a claim upon which relief could be granted. For the reasons stated by the Claims Court, the judgments are affirmed. C.A.Fed.,1988. Last Chance Min. Co., Inc. v. U.S. --- F.2d ----, 1988 WL 23317 (Fed.Cir.), Unpublished Disposition

APPENDIX C

FEDERAL LAND PLANNING AND MANAGEMENT ACT

43 U.S.C. § 1744

(a) Filing requirements.

The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall, within the three-year period following October 21, 1976, and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. The owner of an unpatented lode or placer mining claim located after October 21, 1976, shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection:

(1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, on (sic) a detailed report provided by section 28-1 of Title 30, relating thereto.

(2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.

(b) Additional filing requirements.

The owner of an unpatented lode or placer mining claim or mill or tunnel site located prior to October 21, 1976, shall, within the three-year period following October 21, 1976, file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim or mill or tunnel site sufficient to locate the claimed lands on the ground. The owner of an unpatented lode or placer mining claim or mill or tunnel site located after October 21, 1976 shall, within ninety days after the date of location of such claim, file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of

location, including a description of the location of the mining claim or mill or tunnel site sufficient to locate the claimed lands on the ground.

(c) Failure to file as constituting abandonment; defective or untimely filing.

The failure to file such instruments as required by subsections (a) and (b) of this section shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner; but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof, or if the instrument is filed for record by or on behalf of some but not all of the owners of the mining

claim or mill or tunnel site.

(d) Validity of claims, waiver of assessment, etc., as unaffected.

Such recordation or application by itself shall not render valid any claim which would not be otherwise valid under applicable law. Nothing in this section shall be construed as a waiver of the assessment and other requirements of such law.

(Pub.L. 94-579, Title III, § 314, Oct. 21, 1976, 90 Stat. 2769.)

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; not shall private property be taken for public use, without just compensation.

43 CFR § 4.410 Who May Appeal

(a) Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administrative law judge shall have the right to appeal to the Board [Board of Land Appeals], except--
[exceptions not here pertinent]

(2)

No. 87-2000

In the Supreme Court of the United States

OCTOBER TERM, 1988

LAST CHANCE MINING CO., INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in dismissing their just compensation claim, arising from the government's purported loss of records filed by petitioners with the Bureau of Land Management pursuant to the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.*

1. The Federal Land Policy and Management Act of 1976 (the Act) "creates a federal recording system designed to clear up uncertainty surrounding many mining claims" (Pet. App. A4). Under Section 314 of the Act, 43 U.S.C. 1744, an owner of an unpatented lode or placer mining claim located prior to October 21, 1976, must file a notice or certificate of location of the claim. That filing must be made with the Bureau of Land Management (BLM), and must also be recorded by BLM, on or before October 22, 1979. In addition, in the year of the initial recording, and prior to December 31 of every year thereafter, each claimant "must file with state officials and with BLM either a

notice of intention to hold the claim, an affidavit of assessment of work performed on the claim, or a detailed reporting form" (Pet. App. A4). Finally, Section 314(c) of the Act, 43 U.S.C. 1744(c), provides that "[t]he failure to file such instruments * * * shall be deemed conclusively to constitute an abandonment of the mining claim * * *." In *United States* v. *Locke*, 471 U.S. 84 (1985), this Court upheld the constitutionality of Section 314(c).

2. Petitioners were owners of unpatented mining claims that had been located prior to October 21, 1976. They alleged that, in compliance with the Act, they submitted all the requisite documents to BLM prior to October 22, 1979, but that BLM personnel had negligently failed to record the filing. As a result, petitioners asserted, a different mining company ousted petitioners' claim and extracted large amounts of ore from the property. Petitioners accordingly commenced a damages action in the United States Claims Court, alleging three causes of action: (1) breach of a fiduciary duty owed to petitioners by the Secretary of the Interior; (2) breach of an implied-in-fact contract arising from the Act and its implementing regulations; and (3) a taking in violation of the Fifth Amendment, giving rise to a claim for just compensation. Pet. App. A10-A11.

Without resolving the factual dispute over whether petitioners had actually filed the required documents with BLM (see Pet. App. A6-A12), the Claims Court dismissed petitioners' complaint for failure to state a claim (*id.* at A1-A34). It first found (*id.* at A12-A17) that petitioners' action based on a breach of fiduciary duty was outside the jurisdiction of the Claims Court and that, in any event, petitioners had been "unable to point to any act or regulation which can be construed as creating a trust relationship between [them] and the United States, much less one which is justiciable in this court" (*id.* at A14-A15). Next,

the court rejected (*id.* at A17-A21) petitioners' contract claim, finding that the " 'plethora of rules, regulations and statutes' " on which petitioners relied "do not purport, even by implication, to constitute an offer" to contract (*id.* at A17, A20). The court also dismissed petitioners' claim for just compensation under the Fifth Amendment (*id.* at A21-A28). It could find "no precedent * * * for the proposition that the inaction of a regulatory body in carrying out its statutory duty under circumstances similar to those alleged here has ever been held to be a taking" (*id.* at A22-A23). Finally, having rejected petitioners' three claims on the merits, the court observed that had petitioners been seeking review of a final administrative decision rejecting their mineral rights claims, the Claims Court would lack jurisdiction, since only a federal district court may entertain such a challenge, pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* And even then, the court added, petitioners' position would have been further "[c]omplicat[ed]" by their failure to exhaust administrative remedies. Pet. App. A29-A34. In an unpublished order (*id.* at B1-B2), the court of appeals affirmed "[f]or the reasons stated by the Claims Court * * *."

3. The courts below correctly rejected petitioners' just compensation claim. As the Claims Court observed (Pet. App. A22), petitioners have "cite[d] no precedent * * * for the proposition that the inaction of a regulatory body in carrying out its statutory duty under circumstances similar to those alleged here has ever been held to be a taking." Indeed, this Court's decision in the *Locke* case is persuasive authority to the contrary. There, as here, the plaintiffs contended that government negligence—in that case, the provision of misleading information about a filing deadline—had prevented the plaintiffs from complying with the terms of the Act in a timely fashion. This Court, noting that the Act imposed only "the most minimal of

burdens on claimants" (471 U.S. at 106), rejected plaintiff's demand for just compensation. The Court explained that, notwithstanding the alleged misinformation, the plaintiffs could easily have taken steps to learn the correct filing date, but they failed to do so. The Court held (*id.* at 107 (citation omitted)) that it had " 'never required [Congress] to compensate the owner for the consequences of his own neglect.' "

Here, as well, petitioners had ample opportunities to comply with the Act, but failed to do so. Even were they correct in alleging negligence by BLM – a question that the courts below did not resolve – petitioners could easily have taken steps to ensure that their papers were timely filed and recorded by the agency. Their neglect to do so is entirely their own and warrants no compensation from the government under the Fifth Amendment.[1]

4. Petitioners also challenge (Pet. 13-18) the court of appeals' suggestion that petitioners failed to exhaust administrative remedies. In fact, however, the courts below referred to exhaustion only in passing, and even then only as an "observation" (Pet. App. A29) that had no apparent effect on the outcome of the case. Whatever the merit of petitioners' claim that exhaustion would have proved futile,[2] there is no reason to review that claim in the present case.

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[1] Petitioners err in relying (Pet. 11-12) on *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982). In that case, the Court held that appellant's due process rights had been violated when the Illinois Fair Employment Practices Commission failed to process his discrimination charge in a timely fashion. There is no suggestion in the case, however, that the appellant had a cognizable claim for just compensation.

[2] It is manifest that an administrative claim by petitioners that BLM had improperly failed to record their filings would have served "[t]he basic purpose of the exhaustion doctrine * * * to allow an adminis-

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1988

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trative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors • • •." *Parisi* v. *Davidson*, 405 U.S. 34, 37 (1972). Petitioners elected instead to sue for a monetary award.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60585